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2012

### Jury Instructions on Witness Identification

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# Jury Instructions on Witness Identification

Brian H. Bornstein & Joseph A. Hamm

One of the most important things a judge does when presiding over a jury trial is instruct jurors on the law. No doubt judges themselves are well-versed in the law, and the language of jury instructions is the source of much pre-deliberation wrangling on the part of the attorneys. Yet once judges settle on proper instructions, how effectively do they communicate the law to jurors? What can courts do to make jury instructions more effective? Do judges' nonverbal actions, as well as their words, influence jury decisions?

These questions come up in any jury trial, but they are particularly important in trials relying heavily on witness-identification testimony,<sup>1</sup> for six reasons. First, misidentifications are the most common cause of false convictions.<sup>2</sup> Second, jurors have strong intuitions about the factors that make witness identifications more or less accurate, and many of those intuitions are erroneous.<sup>3</sup> Third, judges themselves have limited knowledge about the factors that do and do not affect identification accuracy.<sup>4</sup> Fourth, a vast amount of empirical research has been conducted on witness identification, giving judges a unique opportunity to guide juror decision making so that it

comports with relevant data on the issue.<sup>5</sup> Fifth, testimony about witness identifications can often be quite technical—especially if it involves expert testimony, as these cases increasingly do—placing challenges on juror decision making.<sup>6</sup> And sixth, traditional procedural safeguards designed to reduce false identifications and convictions—such as voir dire, motions to suppress suggestive identifications, and cross-examination—have only limited effectiveness.<sup>7</sup> Thus, judges are well situated to aid jurors in making proper use of witness-identification testimony.

The purpose of this article is to review psychological research on the impact of jury instructions regarding witness identification, and to present data from several experiments we recently conducted on the topic.<sup>8</sup> Part I covers the issue of jurors' comprehension of judges' instructions, both generally and with regard to identification issues in particular, and concerning nonverbal as well as verbal behavior. Part II presents the results of three jury-simulation studies examining the effect of different kinds of jury instructions about witness-identification testimony. Finally, Part III summarizes the liter-

## Footnotes

1. Most witness identifications are based on visual perception, hence eyewitness identifications. However, some identifications are based on other sensory modalities, especially auditory perception—often referred to as earwitness identifications. We therefore use the more general term *witness identification* unless discussing eyewitness or earwitness identification specifically.
2. Many, if not most, false convictions undoubtedly go undetected. Nonetheless, those that are detected, through DNA testing, show that over 75% involve mistaken witness identification. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 605 (1998); Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCH. SCI. IN THE PUBLIC INTEREST 45, 48-9 (2006). For up-to-date figures on DNA exonerations and case studies on false convictions involving eyewitness testimony, see The Innocence Project website, <http://www.innocenceproject.org>. For a thorough summary of the research literature on eyewitness reliability and its legal implications, see *State v. Henderson*, 208 N.J. 208, 27 A. 3d 872 (2011).
3. For review, see Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY (VOL. 2): MEMORY FOR PEOPLE 501 (Roderick C. L. Lindsay et al., eds., 2007); J. Don Read & Sarah L. Desmarais, *Expert Psychology Testimony on Eyewitness Identification: A Matter of Common Sense?* in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 115 (Brian L. Cutler, ed., 2009).
4. Richard A. Wise & Martin A. Safer, *What US Judges Know and Believe about Eyewitness Testimony*, 18 APPLIED COG. PSYCH. 427 (2004). Judicial misconceptions about witness-identification testimony have been found in samples of non-American judges as well. See Pär A. Granhag et al., *Eyewitness Testimony: Tracing the Beliefs of Swedish Professionals*, 23 BEHAV. SCI. & LAW 709 (2005) (Swedish judges); Svein Magnussen et al., *What Judges Know About Eyewitness Testimony: A Comparison of Norwegian and U.S. Judges*, 14 PSYCH., CRIME & LAW 177 (2008) (Norwegian judges); Richard A. Wise et al., *A Comparison of Chinese Judges' and U.S. Judges' Knowledge and Beliefs About Eyewitness Testimony*, 16 PSYCH., CRIME & LAW 695 (2010) (Chinese judges).
5. Although judges cannot, of course, introduce new evidence when instructing the jury, they can nonetheless instruct jurors on the weight to give different elements of an identifying witness's testimony. Indeed, part of the New Jersey Supreme Court's mandate in *Henderson*, *supra* note, was to do just that. The new instructions have recently been promulgated and take effect on September 4, 2012. See Benjamin Weiser, *New Jersey Court Issues Guidance for Juries about Reliability of Eyewitnesses*, N.Y. TIMES (July 19, 2012).
6. See generally Tanja R. Benton et al., *Has Eyewitness Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY (VOL. 2): MEMORY FOR PEOPLE 453 (Roderick C. L. Lindsay et al. eds., 2007); David Faigman et al., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY VOL. 2: SOCIAL & BEHAVIORAL SCIENCE 449 (2005).
7. Lori van Wallandael et al., *Mistaken Identification = Erroneous Conviction? Assessing and Improving Legal Safeguards*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY (VOL. 2): MEMORY FOR PEOPLE 557 (Roderick C. L. Lindsay et al. eds., 2007); Jennifer L. Devenport et al., *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 51 (Brian L. Cutler ed., 2009).
8. We would like to thank Ryan Anderson and Jenna Henkes for their assistance in conducting the studies.

ature and offers recommendations for judges dealing with cases involving witness identifications.

## JURORS' COMPREHENSION OF INSTRUCTIONS

### General Comprehension

Empirical research consistently demonstrates that jurors often struggle to comprehend judges' instructions.<sup>9</sup> This has been found in both mock-jury studies<sup>10</sup> and in post-trial interviews of actual jurors.<sup>11</sup> For example, Reifman and colleagues surveyed over 200 Michigan citizens summoned for jury duty, comparing those who served on criminal trials, civil trials, and those who ended up not serving.<sup>12</sup> They questioned participants on various aspects of procedural and substantive law. Performance varied somewhat depending on case and question type, but overall it was less than 50%, and in some instances jurors who actually received judges' instructions performed no better than uninstructed participants.<sup>13</sup>

Several jury-simulation studies have found that simplifying jury instructions significantly improves jurors' comprehension.<sup>14</sup> The revising efforts rely primarily on techniques such as using shorter sentences, replacing passive with active voice, simplifying vocabulary and reading difficulty, and eliminating legal jargon. Some studies have also found a benefit from including instructional aids such as flowcharts.<sup>15</sup> The success of these empirical studies led the American Bar Association to promote revising jury instructions for greater comprehensibility,<sup>16</sup> and several states have recently overhauled their jury instructions in part or in whole.<sup>17</sup>

### Judges' Nonverbal Behaviors

These studies show clearly that the exact language judges use to deliver jury instructions influences jurors' comprehension. But what about the things that judges *do not* say, that is, their demeanor and nonverbal behavior? It is a well-known psychological phenomenon that communicators' expectations, transmitted nonverbally, can unintentionally affect others' responses to the message.<sup>18</sup> Jurors are not immune to such effects.<sup>19</sup> For example, Andrea Halvorsen and colleagues conducted a jury-simulation experiment that varied the judge's expectation regarding the defendant's guilt: The judge believed the defendant to be either guilty or not guilty.<sup>20</sup> Although the instructions were identical in both conditions, adult (non-student) mock jurors were more likely to find the defendant guilty when the judge believed the defendant to be guilty (79.2%) than when the judge believed the defendant was not guilty (66.7%).<sup>21</sup> As the instructions were the same, the only possible explanation is that judges somehow conveyed their expectation via their demeanor. Importantly, the effect of judges' nonverbal behaviors was greater when they read standard jury instructions than when they read instructions that had been revised for greater comprehensibility.<sup>22</sup> Other research has found that

**"[S]tudies show [the] language judges use to deliver jury instructions influences jurors' comprehension. But what about the things that judges do not say...?"**

9. See generally Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 454-58 (2006); Prof. Marder provides a cogent analysis of the reasons why jury instructions have remained resistant to change, as well as innovative approaches to improving jury instructions. See also Joel D. Lieberman, *The Psychology of the Jury Instruction Process*, in JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESS: PSYCHOLOGY IN THE COURTROOM, VOL. 1, 129 (Joel D. Lieberman & Daniel A. Krauss eds., 2009).
10. E.g., Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411 (1994); Richard L. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCH. 455 (1995); Carolyn Semmler & Neil Brewer, *Using a Flow-Chart to Improve Comprehension of Jury Instructions*, 9 PSYCHIATRY PSYCHOL. & LAW 262 (2002); Richard L. Wiener et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 PSYCHOL., PUB. POL'Y & LAW 516 (2004).
11. Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539 (1992); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993).
12. Reifman et al., *supra* note 11, at 544. Participants were surveyed shortly after their service was over.
13. *Id.* at 546-49. Notably, the questions were true-false, so participants should have been able to score 50% correct merely by chance.
14. The seminal study was conducted by Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUMBIA L. REV. 1306 (1979). For review, see Joel D. Lieberman & Bruce D. Sales,

- What Social Science Teaches Us about the Jury Instruction Process*, 3 PSYCHOL., PUB. POL'Y & LAW 589 (1997); Michael T. Nietzel et al., *Juries: The Current State of the Empirical Literature*, in PSYCHOLOGY & LAW: THE STATE OF THE DISCIPLINE 23 (Ronald Roesch et al. eds., 1999); Lieberman, *supra* note 9.
15. Semmler & Brewer, *supra* note 10; Wiener et al., *Guided Jury Discretion*, *supra* note 10.
16. AM. BAR ASSOC'N, PRINCIPLES FOR JURIES AND JURY TRIALS (2005). Several of the principles address juror understanding, but the most directly relevant is Principle 14: "The court should instruct the jury in plain and understandable language regarding the applicable law and the conduct of deliberations." *Id.* at 20-21.
17. See Marder, *supra* note 9, at 475-81. Marder discusses the experience of several states, but she focuses on California's "plain-language" effort, which is probably the most ambitious attempt to date.
18. See generally Peter D. Blanck et al., *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Trials*, 38 STANFORD L. REV. 89 (1985); Robert Rosenthal, *Covert Communication in Classrooms, Clinics, Courtrooms, and Cubicles*, 57 AMERICAN PSYCHOLOGIST 839 (2002).
19. Rosenthal, *supra* note 18, at 846.
20. Andrea M. Halvorsen et al., *Reducing the Biasing Effects of Judges' Nonverbal Behavior with Simplified Jury Instruction*, 82 J. APPLIED PSYCH. 590 (1997).
21. *Id.* at 595.
22. *Id.* It is also noteworthy that the authors did not observe an effect of judges' nonverbal behaviors when the mock jurors were students, as opposed to nonstudent adults. *Id.* at 594. Thus, those most likely to serve on actual juries—non-students—are most likely to be affected by judge's demeanor.

**“[Can judges’ demeanor] be used... to enhance jurors’ comprehension or to improve their application of instructions[?]”**

judge’s nonverbal behavior influences mock jurors’ perceptions of defendant liability in civil cases as well.<sup>23</sup>

These studies demonstrate that a judges’ demeanor can influence trial outcomes, which is obviously undesirable. The question remains whether a judges’ demeanor can be used for a good end, namely, to enhance jurors’ comprehension or to improve their application of instructions. Our second study,

described *infra*, explores this possibility.

### **Comprehension of Witness-Identification Instructions**

The studies discussed thus far concern simplifying instructions generally, and not instructions about witness-identification testimony in particular. In identification cases, defense counsel can request a cautionary instruction that addresses concerns about identification accuracy. The best-known such instruction derives from *United States v. Telfaire*.<sup>24</sup> The *Telfaire* instructions direct jurors to consider a limited number of specific factors when evaluating eyewitness testimony, such as opportunity to observe the perpetrator, strength of the identification, viewing conditions that may have influenced the identification, and the witness’s overall credibility.<sup>25</sup> Importantly, the instructions identify these factors, but they do not explain *how* they influence eyewitness memory. For example, they direct jurors to consider the witness’s opportunity to observe, but they fail to go further and explain that better opportunity to observe is associated with more reliable memory. Some of these factors might seem like common sense, but, as mentioned previously, jurors’ commonsense notions about eyewitness behavior are often erroneous.<sup>26</sup>

Two issues come up with respect to instructions about identification witnesses. First, how well do jurors understand the instructions? Second, what effect do the instructions have on jurors’ decisions in cases that feature an identification witness? With respect to the first question, a meta-analysis<sup>27</sup> conducted by Nietzel and colleagues found that revised instructions improved mock jurors’ memory for the instructions, though not their memory for trial facts.<sup>28</sup> There is some evidence that revised instructions are particularly effective at moderating jurors’ evaluations of eyewitnesses.<sup>29</sup>

Professor Edie Greene conducted a series of jury simulation studies to examine the second question.<sup>30</sup> Greene compared the standard *Telfaire* instructions to a revised *Telfaire* condition, which used simpler language and explained how various factors influence eyewitness memory, as well as to a control condition with no cautionary instructions. There was little difference between the control and standard *Telfaire* conditions; however, the revised *Telfaire* instructions made mock jurors more skeptical about eyewitness testimony, and they also had a better understanding of eyewitness memory.<sup>31</sup> Neither set of instructions helped participants distinguish between good and poor eyewitnesses.<sup>32</sup> However, other research has found that instructions about which factors specifically influence witness credibility do moderate the influence of witness testimony.<sup>33</sup> Thus, there is some cause for cautious optimism that instructions dealing specifically with witness-identification testimony can improve juror decision making.

### **RESEARCH OVERVIEW**

We conducted a series of mock-jury studies to examine different means of improving jurors’ comprehension and application of witness-identification instructions. The techniques included rewriting the instructions, adding written instructions, and varying the judge’s demeanor while delivering the instructions.<sup>34</sup> In addition to requesting a verdict, we assessed

23. Marisa E. Collett & Margaret B. Kovera, *The Effects of British and American Trial Procedures on the Quality of Juror Decision-Making*, 27 LAW & HUM. BEHAV. 403, 415-16 (2003).

24. 469 F.2d 552 (D.C. Cir. 1972).

25. Devenport et al., *supra* note 7, at 62.

26. See Benton et al., *supra* note 6, at 475-85.

27. Meta-analysis is a statistical technique by which relevant comparisons within similar studies are statistically aggregated to determine their overall effect.

28. Nietzel et al., *supra* note 14, at 35 (Table 2.4). This meta-analytic study compared “enhanced” to standard jury instructions, where enhanced instructions included efforts to improve comprehensibility, as well as other attempts to heighten the instructions’ impact (e.g., through multiple deliveries).

29. *Id.*, at 35-36.

30. Edie Greene, *Judge’s Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCH. 252 (1988).

31. *Id.*

32. *Id.* These findings—that *Telfaire* instructions increase juror skepticism but do not sensitize jurors to relevant evidence—have been replicated elsewhere. See Gabriella Ramirez et al., *Judges’ Cautionary Instructions on Eyewitness Testimony*, 14 AMER. J. FORENSIC PSYCH. 31 (1996).

33. For example, Bollingmo and colleagues found that an instruction

informing participants that a victim-witness’s emotional expression is not a reliable cue to her credibility lessened the impact of variations in the witness’s emotional expression. Guri Bollingmo et al., *The Effect of Biased and Non-biased Information on Judgments of Witness Credibility*, 15 PSYCH., CRIME & LAW 61 (2009). Importantly, the witness was giving a statement during a police interview, not testifying at trial; and the instruction came from the experimenter, not the judge. Nonetheless, the content of her statement—a description of an alleged rape scenario—was essentially the same as what her trial testimony would have been, and observers’ evaluation of the witness’s credibility was comparable to the sort of credibility judgment that jurors would make at trial.

34. All studies were jury simulations, in which student participants adopted the role of jurors and were presented with abbreviated case facts and jury instructions. The trial was presented in written format, and data were collected online. These methodological characteristics—especially the use of student mock jurors, abbreviated trial materials, and online data collection—might raise questions about the relevance of the findings to how “real” jurors decide “real” cases. These are legitimate concerns, but they are beyond the scope of the present article. Although little research shows that such characteristics influence juror decision making, there is a paucity of research that addresses the issue. See Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?* 23 LAW

subjective comprehension, using the same three items in all of the studies.<sup>35</sup> Specifically, participants were asked how confident they were that they had followed the judge's instructions, how much difficulty they had in understanding the judge's instructions, and how effective the instructions were in helping them reach their verdict.

### Study 1

The first study evaluated the method of simplifying *Telfaire* instructions used in Greene's work,<sup>36</sup> and we compared this to modifying the instructions further to present specific information more directly relevant to the task at hand for the jury. Although pattern instructions have the advantage of reducing the likelihood of reversal on appeal,<sup>37</sup> they are often criticized as not fitting the considerations of the current case.<sup>38</sup> The *Telfaire* instructions provide a perfect example of this because although they are most often thought of as eyewitness instructions, they are also applicable to other forms of sensory-witness identification, like earwitness identification.<sup>39</sup> Specifically, they contain a statement that addresses the possibility that other senses may be used.<sup>40</sup> The present study therefore investigated the applicability of *Telfaire* and modified *Telfaire* instructions to a case involving earwitness, rather than eyewitness, testimony.

To compare these different instruction-improvement methods, 201 undergraduate students read an online trial summary involving a home invasion in which the victim heard (but did not see) the defendant. The victim and a police officer testified about a voice lineup in which the victim identified the defendant as the perpetrator. Participants then read reasonable-doubt instructions and one of three versions of sensory-witness instructions (or a no-instruction control). To replicate Greene's work, one-quarter of participants were presented with

the standard *Telfaire* instructions, and another quarter were presented with the *Telfaire* instructions as simplified by Greene. To compare this approach to a modification containing information more specific to earwitness identification, another quarter of the participants saw the *Telfaire* instructions modified to include the legally admissible issues involved with assessing earwitness identifications.<sup>41</sup> The remaining quarter of the participants saw no identification instructions and read only the instructions about reasonable doubt.

**“[We] investigated the applicability of *Telfaire*... instructions to a case involving earwitness, rather than eyewitness, testimony.”**

We also created two versions of the instructions in which witnessing conditions (e.g., perpetrator's voice disguise and the delay between the crime and the identification) were either more or less likely to elicit a correct identification. We did this because it is important to assess the impact of the instructions not only on comprehension itself, but also on jurors' use of evidence presented at trial. Ideally, simplified instructions should improve jurors' use of evidence; in the present trial, that would mean relying more on the identification evidence when the witnessing conditions were conducive to good memory for the perpetrator than when they were not.<sup>42</sup> After reading the randomly assigned instructions, participants were asked to return verdicts and complete subjective measures of comprehension.

Analyses indicated that although participants felt more confident in their verdict with the modified instructions than with standard *Telfaire* instructions,<sup>43</sup> there were no other differences

& HUM. BEHAV. 75 (1999) (discussing mock-juror and trial-presentation characteristics); Kevin M. O'Neil et al., *Web-based Research: Methodological Variables' Effects on Dropout and Sample Characteristics*, 25 BEHAV. RES. METHODS, INSTRUMENTS, & COMPUTERS 217 (2003) (discussing online research methods); Brian H. Bornstein & Sean G. McCabe, *Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research*, 32 FLA. ST. UNIV. L. REV. 443 (2005) (discussing real versus mock-juror decisions).

35. The studies did not include an objective measure of comprehension.

36. Greene, *supra* note 30.

37. Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. LAW & CRIMINOLOGY 198 (1984).

38. E.g., Devenport et al., *supra* note 7, at 62.

39. Earwitness identification refers to “the process of a witness hearing the voice(s) of a perpetrator(s) and encoding that information in memory, retrieving the stored information when called to describe the speaker's voice and/or identify the speaker in a voice lineup, and finally, testifying or communicating those responses to a police officer, trial judge, and/or jury.” A. Daniel Yarmey, *The Psychology of Speaker Identification and Earwitness Memory*, in THE HANDBOOK OF EYEWITNESS PSYCHOLOGY (VOL. 2): MEMORY FOR PEOPLE 101 (Rod C. L. Lindsay et al. eds., 2007), at 101.

40. “In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily

so, and he may use other senses.” United States v. *Telfaire*, *supra* note 24 at 559.

41. United States v. *Angleton*, 269 F. Supp. 2d 868 (S.D. Tex. 2003). In *Angleton*, the court was asked to rule regarding which aspects of an expert witness's testimony about the factors important for earwitness-identification accuracy were admissible in court. The court accepted testimony about the negative effects of an identification sample that is too long, the influence of conversations the identifier had before identification, and the preference of using an audio lineup versus a single voice. The court rejected testimony about preexisting beliefs, the identifier's familiarity with target, the quality of the recording, and the influence of the police during the identification.

42. This is often referred to as “sensitizing” jurors to the evidence. See Devenport et al., *supra* note 7; Greene, *supra* note 30. Put another way, revised instructions work if they reduce arbitrariness and improve jurors' application of the law and reliance on relevant evidence. See Shari S. Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AMER. PSYCHOL. 423 (1993). Presumably, simplified jury instructions have this effect via better comprehension, an assumption for which there is some empirical support. See Richard L. Wiener et al., *Guided Jury Discretion*, *supra* note 10. Of course, if revised instructions reduced jurors' ability to apply the law correctly, then that would be a compelling argument against the revision.

43.  $F(1,91)=4.06$ ,  $p=.047$ .

**“[W]e conducted a third study to assess the effect of adding interactive instructions.”**

## Study 2

A second study was conducted to evaluate how the presentation of the instructions might affect jurors' subjective experience with them. To better approximate the conditions under which jurors experience trials, jury instructions were videotaped and presented either with or without written transcripts for the participant's reference. One hundred and forty-one participants were asked to read either the good or poor witnessing version of the same trial summary used in the above study and then presented with the general jury instructions regarding their application of the law. Participants were also randomly assigned to receive or not receive written versions of the instructions and then asked to return verdicts and rate the instructions.<sup>44</sup>

This study also examined the effects of the judge's nonverbal communication. Because some research has shown that the judge's general demeanor can have an effect on the jury,<sup>45</sup> two versions of the jury instructions were videotaped and shown to participants. In the first version, which we refer to as the *encouraging* condition, the judge presented himself as interested and engaged in the trial and used language manipulated to be encouraging to the jury (e.g., “It is *extremely important* that you perform your duties,” and, “While the information presented here today may seem overwhelming, I *appreciate your commitment* to this trial.”). In the second condition, called the *stoic* condition, the judge acted somewhat disinterested in the case, refrained from using encouraging speech, and emphasized the imperatives in the instructions (e.g., “You *must* perform your duties,” and “You *will not* be concerned...”).<sup>46</sup>

Analyses uncovered no significant effects of whether the participant was given written instructions on subjective instruction ratings. However, they did uncover a significant interaction with the witnessing condition on the measure of verdict,<sup>47</sup> such that participants who were able to reference a

by instruction condition on any other measure of subjective comprehension. Additionally, the instructions did not have an effect on the mock jurors' verdict, nor did they sensitize them to good-vs.-poor witnessing conditions.

written version of the instructions were significantly more likely to convict the defendant in the poor witnessing condition, indicating that the written version of the instructions actually decreased sensitivity to the relevant identification factors.<sup>48</sup> Contrastingly, the verdicts of participants who did not have the written instructions were not significantly affected by the witnessing condition.<sup>49</sup>

No significant effects were identified for the judge's nonverbal communication. Participants were equally likely to convict regardless of whether they saw the stoic or encouraging instructions.<sup>50</sup> There was also no interaction of the stoic-vs.-encouraging instructions with the good-vs.-bad witnessing conditions, indicating that the judge's demeanor did not improve mock jurors' decision making by making them more sensitive to the witness-identification testimony.

## Study 3

Finally, because some research has shown that interactive presentation of material increases its usefulness,<sup>51</sup> we conducted a third study to assess the effect of adding interactive instructions. One hundred and two participants again read either the good or poor witnessing version of the trial summary, followed by the same videotaped instructions from the second study, which again either were or were not accompanied by a written transcript. This time, however, the instructions were also manipulated either to include or not include interactive instructions, creating a 2 (good-vs.-poor witnessing condition) by 2 (with or without interactive instructions) by 2 (with or without the accompanying written transcript) design. In the interactive-instruction condition, the video was cut into sections, each of which was immediately followed by a single multiple-choice question. Participants were unable to continue until they provided the correct answer. This method highlighted specific parts of the instructions relevant to their decision (e.g., burden of proof, reasonable doubt) and was expected to improve mock jurors' subjective experience and comprehension.

Analyses again showed that the availability of written instructions did not affect participants' subjective estimate of comprehension.<sup>52</sup> Also, in contrast to Study 2, the written instructions did not desensitize participants to differences in the quality of the witness-identification testimony.<sup>53</sup> Analyses regarding the interactive-instructions manipulation indicated

44. Participants who received written instructions were split further into two different conditions: one that heard the instructions orally both before and after trial, and one that heard oral instructions only after the trial. These two groups are combined into a single “written-instructions” condition for present purposes.

45. See notes 18-23, *supra*, and accompanying text.

46. A pretest showed that participants found the encouraging judge significantly more friendly, encouraging, supportive, fair, kind, and approachable, and less stern and impatient, than the stoic judge.

47.  $F(1,129)=5.42, p = .021$ .

48. Of the participants who saw the good witnessing condition and the written instructions, 10% convicted. Of the participants who saw the poor witnessing condition and the written instructions, 39% convicted. Such a “desensitization” effect, if corroborated by additional research, would be quite troubling.

49. Of the participants in the good witnessing condition, 25% convicted, compared to 19% in the poor witnessing condition.

50. 20% of participants convicted in the stoic condition, whereas 29% convicted in the encouraging condition:  $F(1,131)=1.38, p = .24$ .

51. E.g., Cathy W. Hall et al., *Psychology of Computer Use: XXXIII. Interactive Instructions with College-Level Science Courses*, 76 PSYCHOL. REPORTS 963 (1995). Interactive instructions are instructions that are intended to move the learner from a passive to an active role by requiring his or her input to proceed, much like the questions that required a response in the current study.

52. Confidence in following instructions,  $F(1,90) = 1.23, p = .27$ ; difficulty in understanding instructions,  $F(1,89) = .004, p = .95$ ; effectiveness of the instructions,  $F(1,89) = .001, p = .97$ .

53.  $F(1,84) = 2.961, p = .09$

that although participants who saw the interactive instructions perceived them as being significantly more effective,<sup>54</sup> there was only a marginally significant main effect on verdict<sup>55</sup> and no interaction with witnessing condition.

## CONCLUSIONS AND RECOMMENDATIONS

The findings of the present studies are largely consistent with other research on jurors' comprehension of jury instructions. Specifically, various revisions to the instructions—such as modifying the language, providing written as well as oral instructions, and including interactive instructions—had slight effects on mock jurors' subjective comprehension of the instructions, but these effects were not consistent across studies or measures. The modifications did not exert an overall effect on verdicts, but even more importantly—and distressingly—they also did not, by and large, sensitize mock jurors to relevant variations in trial testimony (i.e., good vs. bad witnessing conditions).<sup>56</sup> When the judge delivered instructions in a friendlier and more approachable manner, mock jurors perceived the judge more favorably; but the judge's demeanor likewise did not influence their verdicts or make them more sensitive to identification witness testimony.

Importantly, we observed almost no evidence that these modifications to jury instructions made mock jurors' decisions worse.<sup>57</sup> There is a clear benefit to making jurors feel that they understand the instructions better, even if that perception is not borne out in their verdicts.<sup>58</sup> Moreover, much research indicates that revising jury instructions leads to better objective comprehension as well.<sup>59</sup> Thus, modifying instructions would seem to be well worth the effort; although some innovations are costly, such as completely rewriting a jurisdiction's pattern jury instructions, others—such as making instructions interactive—are not.<sup>60</sup>

The trickier problem is in modifying instructions not only to improve comprehension—whether that is measured subjectively or objectively—but also to improve the quality of jurors' decision making. There is some evidence that this can occur, as with revising capital jury instructions;<sup>61</sup> however, the research on modifying instructions about witness identification has generally failed to accomplish this goal,<sup>62</sup> and the present studies do not afford a much more optimistic conclusion. Identification might be particularly difficult to address via instructions because of jurors' strong, yet often erroneous,

intuitions about the topic.<sup>63</sup> Therefore, it might be necessary to educate jurors about the fallibility of identification witnesses in more detail, by incorporating into jury instructions the sorts of information that more commonly arise in expert testimony.<sup>64</sup> In light of the severe consequences of false identifications and resulting false convictions, further efforts on the part of judges to sensitize jurors to the vagaries of identification testimony would be highly worthwhile.



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54.  $F(1,89) = 5.31, p = .024$ .

55. Participants convicted less with interactive instructions (22%) than without (41%),  $F(1,86) = 3.79, p = .055$ .

56. Study 2 even found a desensitization effect, where written instructions made mock jurors worse at discriminating between good and poor identification witnesses. Because Study 3 did not replicate this finding, we consider it an anomaly and not a cause for concern.

57. It seems unlikely that simple modifications, such as simplifying complex language, would have a detrimental effect on jury decision making. However, other modifications could. For example, the inclusion of written and/or interactive instructions might confuse jurors, and the judge's demeanor could inadvertently send nonverbal cues affecting jurors' judgments (see notes 18-23, *supra*, and accompanying text).

58. For example, jurors who feel better about their jury service will be less likely to try and get out of jury duty in the future, and will also generally show higher levels of civic engagement.

59. See notes 14-17, *supra*, and accompanying text.

60. On innovations in jury instructions generally, see Marder, *supra* note 9.

61. See Wiener et al., *Guided Jury Discretion*, *supra* note 10.

62. See notes 24-33, *supra*, and accompanying text.

63. E.g., Boyce et al., *supra* note 3; Read & Desmarais, *supra* note 3.

64. On safeguards generally, and their pros and cons relative to expert testimony, see Henderson, *supra* note 2; see also van Wallendael et al., *supra* note 7; Devenport et al., *supra* note 7.